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Facing the Challenge: A Lawyer's Response to Anti-Gay Initiatives

SUZANNE B. GOLDBERG*

We are living in an extraordinary period of gay and lesbian history. As lesbian and gay civil rights gain increasing recognition throughout the country—through small but growing numbers of laws prohibiting sexual orientation discrimination,¹ court rulings protecting lesbian and gay parents' custody of their children,² and a historically unprecedented level of positive media coverage—our struggles also have escalated enormously. Not only must we litigate and negotiate for equal opportunity in employment, housing, and parenting rights as always, but also we face a nationally organized and terrifically well-funded assault on our fundamental rights as citizens.

This nationwide anti-gay assault takes many forms—from hate-mongering talk shows, to anti-gay electoral campaigns, to citizen-sponsored initiatives aimed at repealing civil rights protections and domestic partner benefits programs, and ultimately to those measures which are the subject of this conference—measures that would prohibit future passage of antidiscrimination protections specifically for lesbians, gay men, and bisexuals and repeal any such existing protections.

Although I focus these remarks on the latter measures, which have come to be known popularly as “anti-gay initiatives,” we must bear in mind that these initiatives represent the tip of the iceberg in terms of the total organized opposition to lesbian and gay civil rights. Other orchestrated efforts, including programs such as “Project Spotlight,” which seeks to make support for civil

* Staff Attorney, Lambda Legal Defense and Education Fund, Inc.; A.B., Brown University, 1985; J.D., Harvard University, 1990. With this essay, I salute those who have organized tirelessly in campaigns to defeat not only anti-gay initiatives, but also unfounded prejudice. In particular, I am grateful to Mary Newcombe, Matt Coles, Clyde Wadsworth, Patricia Logue, and the many lawyers working with Lambda Legal Defense and Education Fund and the American Civil Liberties Union on development of legal theories to challenge anti-gay initiatives. For their political acumen, I thank Suzanne Pharr, Renee DeLapp, Scott Nakagawa, and my partner, Paula Ettelbrick. And I thank the many people nationwide with whom I have worked on these issues.

¹ See, e.g., CAL. LABOR CODE § 1102.1 (West Supp. 1994); CONN. GEN. STAT. §§ 46a-81b to 46a-81r (Supp. 1992); D.C. CODE ANN. § 1-2520 (1992); HAW. REV. STAT. § 368-1 (Supp. 1992); MINN. STAT. § 363.03 (Supp. 1994); N.J. REV. STAT. § 10:5-12 (Supp. 1994); VT. STAT. ANN. tit. 9, § 4503 (1993); WIS. STAT. § 234.29 (1987).

² See, e.g., *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. App. Div. 1979); *Bezoi v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985).

rights protections for lesbians and gay men the death knell of any candidate's campaign for elected office,³ will continue to grow in size and influence even as anti-gay legislation is declared unconstitutional around the country. Without a well-organized and well-informed response to these measures, the efforts to restrict the basic civic participation of lesbians and gay men will only grow stronger.

Also, as we can see by the persistence of these initiatives despite their defeats in court,⁴ the radical right's purpose in promoting the measures is not simply to win at the ballot box or even in court. Rather, the promoters enjoy a victory each time an anti-gay measure is placed on the ballot for popular vote. The initiative process provides them with a "legitimate" forum in which to hold public debate about whether lesbians and gay men are entitled to full citizenship rights and even about whether lesbians and gay men should be free to live in peace. Material that would otherwise receive no attention or at most be buried in the media, such as falsified information about the lives and health of gay people,⁵ suddenly holds the public's interest because it bears on citizens' decisions about a proposed piece of legislation or a constitutional amendment. Under the guise of "information for the electorate," materials are circulated which do nothing more than appeal to popular prejudices against gay people.⁶

As I discuss in greater detail below, the danger of these initiatives goes far beyond their effect on lesbians, gay men, and bisexuals.⁷ This all-out assault on the structure of government and the basic framework of civil rights protections suggests that rather than being labeled *anti-gay* initiatives, these measures should really be known as *antidemocracy* initiatives—and I will sometimes call them just that.

³ Project Spotlight, presently organized by the Ohio branch of the American Family Association, will target Ohio city council elections beginning in November 1995. See Mary Beth Lane, *Group to Target Candidates who Favor Gay Rights*, PLAIN DEALER (Clev.), May 26, 1994, at 2-B.

⁴ See *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 65 Fair Empl. Prac. Cas. (BNA) 1167 (S.D. Ohio 1994) (invalidating anti-gay Cincinnati charter amendment); *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993) (invalidating anti-gay Colorado constitutional amendment); *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) (prohibiting placement of proposed anti-gay constitutional amendment on Florida's statewide ballot).

⁵ See *infra* notes 29–30.

⁶ See discussion *infra* part II.

⁷ See discussion *infra* part III.

I. A CLOSE-UP LOOK AT THE INITIATIVES

As a first step in examining these initiatives, it is important to step back and review exactly what they are. During 1993 and 1994, several different styles of anti-gay initiatives were filed with secretaries of state around the country as the first step toward their placement on the ballot.

Essentially, the measures follow three patterns. The best known, perhaps, is the Colorado Amendment Two style of initiative.⁸ Among anti-gay initiatives, this style is relatively straightforward—it singles out lesbians, gay men, and bisexuals in its text and prohibits any government entity from recognizing claims of discrimination against them.⁹

Specifically, Amendment Two provides:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.¹⁰

A similar measure was enjoined by a federal district court after it passed in November 1993 in Cincinnati, Ohio.¹¹ Virtually identical measures were filed in Arizona, Michigan, and Missouri for the 1994 ballots.¹² The Arizona initiative included a particular twist—adding people of “pedophile” orientation

⁸ See COLO. CONST. art. II, § 30b, *enjoined by*, *Evans v. Romer*, 60 Empl. Prac. Dec. (CCH) ¶ 41, 998 (Colo. Dist. Ct.) (order granting preliminary injunction), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993), 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993) (order granting permanent injunction).

⁹ *See id.*

¹⁰ *Id.*

¹¹ See CHARTER OF THE CITY OF CINCINNATI art. XII, *enjoined by*, *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) (order granting preliminary injunction), 65 Fair Empl. Prac. Cas. (BNA) 1167 (S.D. Ohio 1994) (order granting permanent injunction).

¹² Because campaigners in Arizona, Michigan, and Missouri failed to collect the requisite number of signatures, anti-gay measures will not appear on these states' 1994 ballots. However, some groups have indicated that they intend to reintroduce the measures in future years or conduct local initiative campaigns. For examples of proposed state initiatives, see William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 629 (1994).

to the group of gay, lesbian, and bisexual people that would be excluded from legislative protections.¹³

A second more overtly hostile style of anti-gay initiative first appeared in Oregon in 1992.¹⁴ At that time, Measure Nine sought to amend the Oregon Constitution and to declare homosexuality to be an abnormal lifestyle.¹⁵ Although Measure Nine lost at the polls—a loss which some analysts attributed to the measure's vituperative language—over forty percent of voters supported the initiative. The large showing of support prompted the Oregon Citizens' Alliance to introduce "The Minority Status and Child Protection Act" for the 1994 ballot.¹⁶ This proposed constitutional amendment would impose limitations on government functions in a variety of areas including legislative and civil service protections against discrimination, public education, domestic partnership benefits, and others.¹⁷ For example, subsection (2) of the proposal provides:

Children, students and employees shall not be advised, instructed or taught by any government agency, department or political unit in the State of Oregon that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality.¹⁸

Another section prohibiting "minority status" from being applied to homosexuality by Oregon's government shows similar concern that homosexuality be considered aberrant and rejected.¹⁹

Similar initiatives seeking an official proclamation that homosexuality not be considered the basis for "minority status," "quota preferences," and "special classifications" also were introduced for statewide ballots in Idaho, Nevada, and Washington.²⁰ One of two proposed initiatives in Washington

¹³ *Id.* at 629 (reproducing 1994 Arizona Initiative).

¹⁴ See Timothy Egan, *Oregon Measure Asks State to Repress Homosexuality*, N.Y. TIMES, Aug. 16, 1992, at 1-1, 1-34. (quoting Measure Nine).

¹⁵ *Id.*

¹⁶ See *Lowe v. Keisling*, No. CA A84110, 1994 Ore. App. LEXIS 1345, at *3 (Or. Ct. App. Sept. 1, 1994) (reproducing The Minority Status and Child Protection Act). A pre-election legal challenge to strike the initiative from the state's ballot was rejected by an Oregon court of appeals, which overturned a district court ruling declaring the measure invalid. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ Adams, *supra* note 12, at 630 (reproducing 1994 Idaho Initiative); *id.* at 634 (reproducing 1994 Nevada Initiative); *id.* at 636 (reproducing 1994 Washington Initiatives).

goes even further.²¹ In addition to adding a section entitled "The Special Right of Minority Status Based on Homosexuality Prohibited,"²² the measure would declare in the state's legislative code that adopted, foster, or placed children "must never be placed in households where homosexuality is present in any manner whatsoever" and would add that homosexuality renders a parent unqualified for custody of his or her children upon the dissolution of a marriage.²³

At the opposite end of the spectrum, a third style of initiative does not refer either to gay people or sexual orientation generally. Instead, these measures, proposed in Florida and Maine for the 1994 ballots, provide that the state shall not enact or adopt any laws regarding discrimination based on anything other than a limited set of classifications, which, of course, does not include sexual orientation.²⁴ They provide further that all laws inconsistent with the provision must be repealed.²⁵ Fortunately, neither of these will appear on 1994 ballots—Florida's having been struck by the state supreme court on a pre-election challenge²⁶ and Maine's having failed for lack of sufficient signatures.²⁷

II. APPEALS TO PREJUDICE

Underlying all of these antidemocracy initiatives and reflected in the campaigns to support them are appeals to prejudice of various sorts, gross misinformation about civil rights, and an ultimate motivation to work a profound shift in the structure of democratic government. In fact, the materials do not attempt to disguise their aims. Whether in support of Florida's neutral-sounding measure or Cincinnati's more specific one, the radical right literature takes its readers step by step through its own anti-gay and anti-civil-rights agenda.

First, these measures address and present gay people as a monolithic

Campaigners in Nevada and Washington failed to collect a sufficient number of signatures, so their initiatives will not appear on these states' 1994 ballots. Nevada advocates have promised to reintroduce their measure for 1996.

²¹ *Id.* at 636 (reproducing 1994 Washington Initiative).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 644 (reproducing 1994 Florida Initiative); *id.* at 632 (reproducing 1994 Maine Initiative).

²⁵ *Id.* at 644 (reproducing 1994 Florida Initiative); *id.* at 632 (reproducing 1994 Maine Initiative).

²⁶ *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994).

²⁷ Groups in both states pledged to introduce anti-gay measures at the state or local level for future elections.

group. In printed materials as well as videotapes such as *The Gay Agenda* and *Gay Rights, Special Rights*, which have enjoyed wide circulation among elected officials²⁸ as well as voters, gay people are portrayed as a group which is wildly promiscuous, unhealthy, and predatory toward children.²⁹ Further, gays are identified as overwhelmingly wealthy, well-educated, and generally privileged in contrast to the average American.³⁰ Rarely do people of color or women appear when gay people are portrayed or discussed.

Second, the measures make a clear but silent appeal to racism. By invoking terms such as "minority status," "affirmative action," or "quota preferences," the promoters of these measures use code words that in American society today conjure up race. It matters little that virtually no affirmative action programs for gay people exist, or that "minority status" in law refers to chronological age or a status in corporate law and not group size, or that quotas based on race have been declared unconstitutional by the Supreme Court unless specifically tailored to remedy identified discrimination.³¹ Instead, the initiative supporters appeal to the notion, popular in some sectors of American society, that minority groups are the beneficiaries of special privileges.

III. THE CIVIL RIGHTS/SPECIAL RIGHTS EQUATION

In attempting to arouse opposition to the "special rights" that they allege gays and lesbians seek, groups such as the American Family Political Committee of Florida circulate publications such as *Are Homosexual Rights Traditional Civil Rights?*,³² which explains to readers, "Homosexuals fail to meet the following requirements for Civil Rights minority protection: 1. Demonstrable pattern of discrimination. 2. Economic hardship.

²⁸ *The Gay Agenda* was circulated to all members of Congress during the 1993 debates regarding service by lesbians and gay men in the military. Elizabeth Kastor, *The Gay Moment: Today Just Didn't Happen. It Took a Lot of Yesterdays*, WASH. POST, Apr. 25, 1993, at F1, F5.

²⁹ In the literature used to promote Issue 3, the anti-gay charter amendment in Cincinnati, a group called Take Back Cincinnati explained, "This debate is about *homosexuals forcing their values on you* . . . it is about having *you pay the medical bills* when they become ill as a result of *their* unsafe, high risk sexual practices. . . . In the homosexual's *own written agenda*, the following is very clear: *They want the children.*" TAKE BACK CINCINNATI, WHY DID CITY COUNCIL GIVE HOMOSEXUALS "SPECIAL RIGHTS"? (1993).

³⁰ AMERICAN FAMILY POLITICAL COMMITTEE OF FLORIDA, ARE HOMOSEXUAL RIGHTS TRADITIONAL CIVIL RIGHTS? (1993).

³¹ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

³² AMERICAN FAMILY POLITICAL COMMITTEE OF FLORIDA, *supra* note 30.

3. Unchangeable or immutable status.”³³ After exclaiming that “HOMOSEXUALS’ ANNUAL INCOME IS NEARLY *FIVE TIMES* AS MUCH AS THAT OF *TRUE MINORITIES*,” the brochure concludes, “WHAT HOMOSEXUAL ACTIVISTS DEMAND ARE NOT TRADITIONAL CIVIL RIGHTS. THEY ARE GOVERNMENT-ENFORCED SPECIAL PRIVILEGES.”³⁴

Although most constitutional law students could identify the flaws in this analysis, the majority of Americans have not been briefed in equal protection theory and are more subject to persuasion—particularly after the past decade in which enforcement of civil rights protections was clearly not the priority of the Reagan and Bush administrations. However, the widely circulated promotional materials for anti-gay initiatives focus repeatedly on minority protections and minority rights and disregard the fact that antidiscrimination laws prohibit the invidious use of a classification to discriminate against anyone. This notion that civil rights protections actually benefit only members of minority groups has been convincing to many voters. From that point on, the equation of civil rights with “special rights” is quite simple.

The next stage of analysis uncovers an even more disturbing aspect of the initiative campaigns. As civil rights become “special rights,” it is a short step to conclude that “special rights” belong only to groups who “deserve” them. Given that most Americans believe their neighbors do not deserve more than them, the path has been forged for a quick rejection of “special rights” for any group—gay, lesbian, or otherwise. Once the egalitarian basis for civil rights laws is submerged beneath rhetoric about an unequal sort of “special rights,” the dismantling of our entire framework of civil rights protections has been essentially achieved. In this light, it is not difficult to imagine that the videotape to follow *Gay Rights, Special Rights* might be *Women’s Rights, Special Rights* or *Black Rights, Special Rights*. The argument flows easily that “special rights” for any group conflict with America’s promise of equality for all.

Finally, if civil rights or “special rights” are to be accorded only to deserving minority groups, there must be a standard in place to determine who deserves such elevation to “minority status.” Here, we must turn to examine the promoters of these initiatives. Anti-gay initiatives are hardly the only agenda items of groups introducing the measures which include the Traditional Values Coalition, the American Family Association, and other organizations affiliated with the right wing Christian Coalition. In addition to having a strong antichoice platform on abortion issues, which served as a primary fundraising and organizing platform during the 1980s much like gay rights issues do today, these organizations also promote school voucher programs that enable religious

³³ *Id.*

³⁴ *Id.*

schools to receive government funding and oppose public school education not only about sexuality, but also about critical thinking.³⁵ In that vein, many of these organizations have participated actively in efforts to remove a wide range of books from public libraries extending far beyond those related to homosexuality or sexuality generally.³⁶ These organizations also have been leaders in promoting prayer in schools.³⁷ And many of the same organizations have been strong advocates for reinforcement of so-called traditional family values by challenging equality between the sexes and reinforcing the notion that men are the permanent, natural, and infallible heads of households.

What becomes clear is that the ultimate goal sought by many leading promoters of the anti-gay initiatives is not merely to sweep away citizenship rights for lesbians and gays, or even civil rights protections generally, but rather to squelch the principle of separation of church and state and replace it with a fundamentalist Christian-based theocratic government, based on the principles of the Christian Coalition.

IV. A CRITICAL ROLE FOR LAWYERS

Given the high risks posed by the anti-gay initiatives to democratic society, lawyers have a historical opportunity and a historical duty to play a significant role as defenders of the Constitution. Whether by litigating against these measures, writing opinion articles for the local paper, or participating in community debates or education, it is critical that each of us take on the challenge presented. After all, many Americans have not studied civics or constitutional law at graduate, college, or even high school levels. When confronted with the sort of "special rights" arguments made by initiative promoters, it is no surprise that the anti-gay rhetoric gains power. By providing a "Government/Civil Rights 101" education so that people can make informed judgments when presented with anti-civil-rights initiatives, we engage in the highest form of public service—community education. No forum should be left out; bar associations, professional organizations, and even social clubs provide some opportunity for raising public awareness. And, engaging in this discussion and debate is not only our duty as citizens in the democratic process, but also is vital for the process's very survival.

In addition, even litigation against the initiatives must be undertaken with

³⁵ See PEOPLE FOR THE AMERICAN WAY, *TEACHING FEAR: THE RELIGIOUS RIGHT'S CAMPAIGN AGAINST SEXUALITY EDUCATION* (1994).

³⁶ See PEOPLE FOR THE AMERICAN WAY, *PROTECTING THE FREEDOM TO LEARN* (1989).

³⁷ See PEOPLE FOR THE AMERICAN WAY, *THE RELIGIOUS RIGHT'S NEW SCHOOL PRAYER MOVEMENT* (1994).

an awareness of the broad nature and effect of the initiatives. By selecting plaintiffs who reflect the diversity of lesbians and gay men—people of both sexes and all races and backgrounds—we can use our lawsuits to shatter the initiative promoters' portrayal of gay people as a monolithic set at the same time as we challenge the constitutionality of the measures. Additionally, in pre-election challenges to strike proposed initiatives from the ballot, broader standing requirements enable litigators to bring in a wide range of community organizations to protest a proposal's deceptive language or unconstitutional effect. So, for example, groups such as the League of Women Voters, which served as a pre-election challenge plaintiff in Cincinnati,³⁸ or the Hispanic Bar Association, which filed a pre-election challenge in Florida,³⁹ raise public awareness that anti-gay initiatives threaten entire communities and not simply the gay, lesbian, and bisexual citizens they target. Similarly, amicus briefs from psychological associations, educators, health care providers, bar associations, labor organizations, and religious groups alert courts and the general public to the wide-ranging threats the initiatives pose.

V. THE CHALLENGES AHEAD

Still, with each legal victory comes an announcement of another anti-gay initiative elsewhere. The moment after the Florida Supreme Court struck a proposed anti-gay initiative from the statewide ballot,⁴⁰ organizers announced plans to file anti-gay measures in upcoming local elections. In Oregon, after the first anti-gay constitutional amendment was defeated by voters in 1992,⁴¹ the Oregon Citizens' Alliance immediately filed scores of proposals for anti-gay city and county charter amendments and followed those with another anti-gay constitutional initiative for the state's 1994 ballot⁴² and yet another for the 1996 election.⁴³

Solid and continued public education efforts, combined with thoughtful litigation, are our best remedy for these offensives. Indeed, if there is any silver

³⁸ Equality Found. of Greater Cincinnati v. City of Cincinnati, 65 Fair Empl. Prac. Cas. (BNA) 1167 (S.D. Ohio 1994).

³⁹ *In re* Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994).

⁴⁰ *Id.*

⁴¹ See Egan, *supra* note 14 (quoting Measure Nine).

⁴² See Lowe v. Keisling, No. CA A84110, 1994 Ore. App. LEXIS 1345, at *3 (Or. Ct. App. Sept. 1, 1994) (reproducing The Minority Status and Child Protection Act).

⁴³ Ben Winton, *Planned McCain Speech Draws Fire; Fund-Raiser for Oregon Anti-Gay Rights Group may bring Backlash*, PHOENIX GAZETTE, Aug. 11, 1993, at A1.

lining to the assault on civil rights, it is the inspiring organization and coalition building of lesbian and gay organizations along with a tremendous range of religious, racial, ethnic, labor, and other community groups working together to defeat the antidemocracy measures.

With these initiatives, we face a tremendous challenge and also a tremendous opportunity. By talking with each other, working together, and organizing effectively, we have the opportunity to put forward a vision of community—not one that divides its members from one another as the anti-gay initiatives propose. Rather, we offer a vision of community that welcomes and embraces the diversity of all people. It is this challenge that we must take on and meet with our combined effort, and in that way, take advantage of the opportunity to fulfill this nation's promise of liberty and justice for all.